

**GARVEY McNEIL &
McGILLIVRAY, S.C.**

ATTORNEYS AT LAW

Edward R. Garvey
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David C. Bender
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Of Counsel:
Peter E. McKeever

March 10, 2009

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Owner or Managing Agent
Didion Milling, Inc.
a/k/a Grand River Distributing
a/k/a Didion Ethanol
501 South Williams Street
Cambria, WI 53923

John A. Didion, Registered
Agent
Didion Ethanol, LLC
520 Hartwig Blvd.
P.O. Box 400
Johnson Creek, WI 53038

Dow Didion
Didion Milling, Inc.
501 South William Street
Cambria, WI 53923

John A. Didion, Registered
Agent
Grand River Distributing,
LLC
520 Hartwig Blvd.
P.O. Box 400
Johnson Creek, WI 53038

John A. Didion, Registered Agent
Didion Milling, Inc.
520 Hartwig Blvd.
P.O. Box 400
Johnson Creek, WI 53038

Re: Supplemental Notice of Intent to Sue

To Those Listed Above:

This letter puts you on notice, pursuant to 42 U.S.C. § 7604(b) and 40 C.F.R. part 54, that Cambrians for Thoughtful Development, U.A., and certain individuals listed below intend to file a Clean Air Act lawsuit against you, including the responsible officials in their individual capacities, in the U.S.

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your facility located at or about 501 South Williamson Street, Cambria, Columbia

County, Wisconsin (“the Plant”).

The persons giving this notice are:

Cambrians for Thoughtful Development, U.A.

c/o John Mueller

307 Mary Street

Cambria, WI 53923

(920) 348-6118

John Mueller

307 Mary Street

Cambria, WI 53923

(920) 348-6118

Leonore Neumann

109 East Commerce Street

Cambria, WI 53923

(920) 348-6531

(hereinafter, together as “Cambrians”) Although this information is provided pursuant to 40 C.F.R. pt. 54, you are requested to discuss the subject matter of this notice with the undersigned legal counsel for Cambrians.

STATUTORY AND REGULATORY BACKGROUND

1. The objective of the federal Clean Air Act is “to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population.” CAA § 101(b), 42 U.S.C. § 7401(b).

2. The United States Environmental Protection Agency (US EPA) has established National Ambient Air Quality Standards (“NAAQS”) for “criteria pollutants,” including sulfur dioxide (SO₂), nitrogen oxide (NO_x), ozone, particulate matter smaller than ten microns (PM₁₀), particulate matter smaller than 2.5 microns (PM_{2.5}), lead and carbon monoxide (CO). 42 U.S.C. § 7602(e); 40 C.F.R. part 50. Areas where the

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ambient air meets the NAAQS are designated as “attainment” areas. 42 U.S.C. § 7407(d). Areas where the ambient air does not meet the NAAQS for a particular criteria pollutant, or areas that contribute to the ambient quality in downwind areas not meeting the NAAQS, are designated “nonattainment” for that pollutant. Id.

3. States are required to adopt plans to implement the federal Clean Air Act. 42 U.S.C. § 7410(a). These plans, called State Implementation Plans or “SIPs,” contain enforceable regulations that are designed, among other things, to prevent degradation of air quality in attainment areas and to clean up the air in nonattainment areas.

4. Pursuant to the Act, each state is required to submit a proposed SIP to US EPA, and if the proposed SIP satisfies the requirements of the Act, it is approved by US EPA through federal notice and comment rule making. Once a state’s SIP is approved by US EPA, it is published in the Code of Federal Regulations and can be enforced by the state, US EPA, or citizens.

5. Wisconsin has a US EPA approved SIP. See 40 C.F.R. § 52.2569, *et seq.*

6. Among the provisions contained in the Wisconsin SIP are Wis. Admin. Code ch. NR 406, 407, 415 and 439.

7. Under the SIP, the Wisconsin Department of Natural Resources (“DNR”) may impose conditions on any air pollution control permit. Wis. Stat. § 285.65¹.

8. Conditions the DNR may impose in an air pollution control permit include monitoring, record-keeping, reporting, and compliance certification requirements, Wis.

¹ The relevant sections of Wis. Stat. ch. 285 cited herein are incorporated into the Wisconsin SIP under their prior section numbers (Wis. Stat. ch. 144). This notice letter refers to the SIP provisions according to their current statutory section for your reference.

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Stat. § 285.65(10), and requirements to submit compliance plans and schedules and progress reports, *id.* § 286.65(11).

9. Violating an air pollution control permit and any conditions it contains is a violation of Wis. Stat. § 285.60, which is part of the Wisconsin SIP. Wis. Stat. § 285.60 and (7); Wis. Admin. Code § NR 406.10.

FACTUAL BACKGROUND

10. Didion Milling, Inc. has operated a grain milling plant (“milling plant”) in the Village of Cambria, Wisconsin, for nearly twenty years.

11. The milling plant is a source of particulate matter pollution emissions. Particulate air pollution is a significant health and welfare threat.

12. You were issued permit 02-RV-166 for the Plant on May 12, 2005. This permit was valid until November 12, 2006. The permit was later extended to May 12, 2008, but was superseded by permit 06-DCF-166 on October 19, 2006, which additionally authorizes construction and operation of a fuel-grade ethanol plant (“ethanol plant”). The ethanol plant is also a source of particulate emissions.

13. You were issued permit 07-DCF-003 on September 4, 2007, for both the milling plant and ethanol plant. The original expiration date for the permit was March 4, 2009, but you asked for and received an extension on the permit from the DNR setting its new expiration date at September 4, 2010.

VIOLATIONS AT DIDION MILLING

A. Stack Testing from the Grain Dryer

14. Permit 07-DCF-003 § I.S''.1.a.(1) contains the following requirement for the milling plant's grain dryer, whose emission point is known as Stack 23 (S23): "the emissions may not exceed 6.96 lb/hr of PM and 1.74 lb/hr of PM10 from S23."

15. This limit is in conformance with Wis. Admin. Code § NR 415.05(2), which establishes acceptable PM emissions limitations for direct sources, and Wis. Admin. Code § NR 404.08(2), which allows the DNR to require more restrictive emission limits where emissions cause or substantially contribute to exceeding an air standard in a localized area, and Wis. Stat. § 265.65(3), which permits the DNR to establish permit conditions necessary for compliance with Wis. Stat. § 265.63.

16. The permit notes that "[t]he facility has elected to meet this limit to attain and maintain the national ambient air quality standard and increment for PM10. This restriction also ensures that this project is minor under Part 70 and PSD." PSD stands for the Prevention of Significant Deterioration program under the Clean Air Act, 42 U.S.C. § 7470 *et seq.*

17. Permit 07-DCF-003 § I.S''.1.b.(5) requires you to "conduct a stack test of the grain dryer PM10 emission rate within 90 days of enclosure and stack venting of the grain dryer."

18. On approximately January 3 and 4, 2008, a stack test was conducted for the grain dryer, S23. The stack test indicated you were emitting 15.46 lb/hour of PM from S23, well in excess of the 6.96 lb/hour rate permitted by Permit 07-DCF-003 § I.S''.1.a.(1).

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19. On April 14, 2008, the DNR notified you, within the meaning of 42 U.S.C. § 7413(e)(2), that “[a]ccording to the results of the S23 stack test, conducted on January 3 and 4, 2008[,] Didion allegedly operated in violation from September 27, 2007 until February 26, 2008.”

20. On November 18, 2008, you conducted five stack test runs of the grain dryer, S23. The results of these stack test runs are as follows, and indicate emission rates for PM and PM10 that are again well in excess of the rates allowed by Permit 07-DCF-003 § 1.S’’.1.a.(1):

Run Number	1	2	Average
PM (lbs/hour)	27.125	23.620	25.373
PM10 (lbs/hour)	9.097	5.261	7.18

Run Number	3	4	5	Average
PM (lbs/hour)	14.41	27.71	22.61	21.58
PM10 (lbs/hour)	10.402	7.011	4.537	7.32

21. On the dates identified above, and on every day since April 4, 2008, you caused a violation of Permit 07-DCF-003 § 1.S’’.1.a.(1). On some of these dates, the measured PM and PM10 emissions were several times what is allowed in your permit. Moreover, it is presumed that you violated each and every day since at least April 4, 2008 because you operated the dryer and have not made sufficient operation and/or pollution control improvements to sufficient reduce emissions of PM and PM10 during operation.

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22. On the dates identified above, and on every day since April 4, 2008, your permit violations resulting from excess PM and PM₁₀ emissions from the grain dryer also caused a violation of Permit 07-DCF-003 §§ I.ZZZ.3, II.B., II.C., and II.L., and Wis. Admin. Code § NR 415.03.

23. Section II.D. of Permit 07-DCF-003 required you to notify DNR by the next business day of certain violations of permit conditions. Wis. Admin. Code § 439.03(4) contains the same requirement.

24. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 § II.D. and Wis. Admin. Code § NR 439.03(4).

25. Additionally, every violation of any permit condition constitutes a violation of Wis. Stat. § 285.60 and Wis. Admin. Code § NR 406.10, which require compliance with all permit terms and conditions.

26. Each day that you violated Permit 07-DCF-003 § I.S''.1.a.(1) by emitting excess PM and PM₁₀, you also caused or contributed to a violation of the emissions limitations for total particulate matter set forth in Wis. Admin. Code §§ NR 404.08(2) and 415.05(2), as well as air quality standards for total particulate matter set forth in Wis. Admin. Code § 404.04(3).

B. DDGS Loadout & Storage

27. Section I.D. of Permit 07-DCF-003 addresses storage of dried distillers' grains ("DDGS"), both in the DDGS elevator and DDGS loadout. Emissions from these facilities are required to be vented to what is known as Stack 33 (S33).

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28. The Permit restricts the amount of PM and PM10 emissions from S33 to 0.29 lbs/hour, and notes that “[t]his emission limit is needed to avoid any exceedance of an ambient air standard or increment.” Permit 07-DCF-003 § I.D.1.a(1) & n.4.

29. Section I.D.1.b(1) of Permit 07-DCF-003 accordingly provides that “[t]he DDGS loadout, elevator, storage building and silos shall be directly vented to and controlled by the DDGS baghouse.”

30. The Permit further restricts fugitive emissions of particulate matter from the DDGS elevator and loadout areas to 0.0467 tons/month of PM10 and 0.0725 tons/month of PM. Permit 07-DCF-003 § I.D.1.a(2).

31. Section I.D.1.b(6) provides that “compliance with I.D.1.a.(2) shall be demonstrated using I.D.1.b(3).

32. Section I.D.1.b(3) of Permit 07-DCF-003 provides that “[t]he DDGS loading area shall be [an] enclosed [and] roofed, four sided area with garage type doors. The garage doors shall be kept closed to the extent possible, to minimize particulate emissions through the openings (e.g. opening doors only as needed to allow entrance and exit of trucks, but allowing them to remain open briefly when multiple trucks are entering and exiting the enclosure.”

33. Section I.D.1.c(4) of Permit 07-DCF-003 also requires the applicant to “maintain records of the occurrence of door movement, door position or other records sufficient to demonstrate that the doors are being kept closed to the extent possible (e.g. a count of the times when the doors are opened or closed, an hour meter for the door motors, a door position recording every 15 minutes, or other equivalent record) when the

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facility is in operation. The facility shall also maintain records of the number of trucks loaded per shift when the facility is in operation.”

34. You maintain a DDGS storage and loadout facility at the ethanol plant, known as Source 33B or S33B.

35. The DDGS storage and loadout facility at S33B is a roofed but open-air building with large openings for loading/unloading DDGS that have no doors. It is not vented to a fabric filter baghouse.

36. By failing to control particulate matter emissions from S33B with a fabric filter baghouse, you have violated Section I.D.1.b(1) of Permit 07-DCF-003 for each day since the permit’s issuance on September 4, 2007.

37. For each day that you violated Section I.D.1.b(1) of Permit 07-DCF-003 as described above, you also violated Permit 07-DCF-003 §§ I.ZZZ.3, II.B., II.C., and II.L, and Wis. Admin. Code § NR 415.03.

38. Additionally, every violation of any permit condition also constitutes a violation of Wis. Stat. § 285.60 and Wis. Admin. Code § NR 406.10, which require compliance with all permit terms and conditions.

39. Each day that you violated Permit 07-DCF-003 § I.D.1.b(1) by failing to control emissions from the DDGS storage and loadout facility (S33B), you also caused or contributed to a violation of the emission limits in Permit 07-DCF-003 § I.D.1.a(1) and air quality standards for total particulate matter set forth in Wis. Admin. Code §§ 404.04(3) and Wis. Admin. Code § NR 415.03.

40. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on

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the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 and Wis. Admin. Code § NR 439.03(4).

41. By failing to fully enclose the DDGS storage and loadout facility and installing garage-type doors, you have violated Section I.D.1.b(3) of Permit 07-DCF-003 for each day since the permit's issuance on September 4, 2007.

42. For each day that you violated Section I.D.1.b(3) of Permit 07-DCF-003 as described above, you also violated Permit 07-DCF-003 §§ I.D.1.c(4), I.ZZZ.3, II.B., II.C., and II.L, and Wis. Admin. Code §§ NR.439.03(12); § NR 439.04(1), NR 439.04(2); and NR 439.10.

43. Each day that you violated Permit 07-DCF-003 § I.D.1.b(3) by failing to control fugitive emissions from the DDGS storage and loadout facility (S33B), you also caused or contributed to a violation of the emission limits in Permit 07-DCF-003 § I.D.1.a(2) and air quality standards for total particulate matter set forth in Wis. Admin. Code §§ 404.04(3) and Wis. Admin. Code § NR 415.03.

44. Additionally, every violation of any permit condition also constitutes a violation of Wis. Stat. § 285.60 and Wis. Admin. Code § NR 406.10, which require compliance with all permit terms and conditions.

45. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 and Wis. Admin. Code § NR 439.03(4).

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46. Section I.D.3.a(1) of Permit 07-DCF-003 provides, “[n]o person may cause, allow or permit any material to be handled, transported or stored without taking precaution to prevent particulate matter from becoming airborne.”

47. Section I.D.3.b(1) provides that “[t]he permittee shall comply with the requirements established in I.W.1.b. for demonstrating compliance with the limitations in I.D.3.a.(1).”

48. Section I.D.3.c.(1) further requires the permittee to “comply with the requirements established in I.W.1.c. for recordkeeping and monitoring requirements.”

49. You have not complied with the requirements established in Permit 07-DCF-003 § I.W.1.b., as set forth in ¶¶ 60-64, *infra*. For each day you have not complied with the requirements of § I.W.1.b., you have violated Permit 07-DCF-003 § I.D.3.b(1).

50. For each day that you violated Section I.D.3.b.(1) of Permit 07-DCF-003 as described herein, you also violated Permit 07-DCF-003 §§ I.D.3.c.(1), I.ZZZ.3, II.B., II.C., and II.L, and Wis. Admin. Code §§ NR.439.03(12); § NR 439.04(1), NR 439.04(2); and NR 439.10.

51. Each day that you violated Permit 07-DCF-003 § I.D.1.b(3) by failing to control fugitive emissions from the DDGS storage and loadout facility (S33B), you also caused or contributed to a violation of the emission limits in Permit 07-DCF-003 § I.D.3.a(1) and air quality standards for total particulate matter set forth in Wis. Admin. Code § NR 415.03.

52. Additionally, every violation of any permit condition also constitutes a violation of Wis. Stat. § 285.60 and Wis. Admin. Code § NR 406.10, which require compliance with all permit terms and conditions.

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53. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 and Wis. Admin. Code § NR 439.03(4).

54. Alternatively to ¶¶ 27-53, *supra*, if S33B is not considered part of S33, and is therefore not controlled by Section I.D. of Permit 07-DCF-003, you have constructed, reconstructed, replaced, relocated, or modified an emissions source without a permit authorizing such activity in violation of Permit 07-DCF-003 § II.H.

55. For each day that you violated Section II.H. of Permit 07-DCF-003 as described above, you also violated Permit 07-DCF-003 §§ I.ZZZ.3, II.B., II.C., and II.L.

56. For each day that you violated Section II.H. of Permit 07-DCF-003 as described above, you have also violated Wis. Stat. § 285.60(5) and Wis. Admin. Code ch. NR 406.

57. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 and Wis. Admin. Code § NR 439.03(4).

58. Regardless of whether S33B was governed by Permit 07-DCF-003 II.D. or was an illegally constructed source under Permit II.L., Permit 07-DCF-003 I.W.1.(a) provides that “[n]o person may cause, allow or permit any materials to be handled, transported or stored without taking precautions to prevent particulate matter from becoming airborne. Nor may a person allow a structure . . . to be used, constructed, altered, repaired, sand blasted or demolished without taking such precautions.”

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59. Wis. Admin. Code § NR 415.04 contains a similar requirement.

60. In order to demonstrate compliance with Section I.W.1.(a), Permit 07-DCF-003 § I.W.1.b. required you to take a number of measures, including:

- a. Evaluating the parking and material handling area conditions on a daily basis, and evaluate other areas of the plant as needed.
- b. Cleaning, sweeping, and removing dust material from the parking and material handling areas and other areas as needed.
- c. Using fabric spout extensions, covered conveyers, or other controls where practical.
- d. Maintaining and following a fugitive dust plan.
- e. Taking precautions to prevent particulate matter from becoming airborne, including application of water, suitable chemicals, or plastic covering on material stockpiles and other surfaces which can create airborne dust, and installation of hoods, fans, and air cleaning devices to enclose and vent the areas where dusty materials are handled.

61. Wis. Admin. Code § NR 415.04(1) requires similar measures.

62. Permit 07-DCF-003 § I.W.1.c.(2) additionally requires you to keep daily records of evaluations, cleaning, sweeping and dust removal activities, including documentation of protocol used to evaluate the parking and material handling area and determinations of when cleaning, sweeping, and dust removal are needed.

63. For each day you failed to enclose the DDGS handling and storage facility known as S33B, and failed to take other measures to control fugitive emissions of PM and PM10 from this facility such as cleaning and venting the facility and covering the

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DDGS piles, you have violated Permit 07-DCF-003 § I.W.1.b. and Wis. Admin. Code § NR 415.04(1).

64. For each day that you violated Permit 07-DCF-003 § I.W.1.b., you have also violated Permit 07-DCF-003 §§ I.W.3.c.(2), I.ZZZ.3, II.B., II.C., and II.L, and Wis. Admin. Code §§ NR.439.03(12); § NR 439.04(1), NR 439.04(2); and NR 439.10.

65. Each day that you violated Permit 07-DCF-003 § I.W.1.b by failing to prevent fugitive emissions from the DDGS storage and loadout facility (S33B), you also caused or contributed to a violation of Wis. Admin. Code § 415.04, the requirements in Permit 07-DCF-003 § I.W.1.a(1) and (2), and air quality standards for total particulate matter set forth in Wis. Admin. Code § NR 415.03.

66. Additionally, every violation of any permit condition also constitutes a violation of Wis. Stat. § 285.60 and Wis. Admin. Code § NR 406.10, which requires compliance with all permit terms and conditions.

67. You did not inform the DNR of your violations of the permit provisions specified above by the next business day. Each day that you failed to notify the DNR on the next business day of each of the violations identified in this notice constitutes a separate violation of Permit 07-DCF-003 and Wis. Admin. Code § NR 439.03(4).

C. False Certification.

68. On July 1, 2008, you applied to modify or replace Permit 07-DCF-003 and to revise proposed permit 111081520-F02.

69. Each day that you submitted an application for a permit pursuant to NR 407, which included a false statement that you were in compliance with all applicable

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requirements, including but not limited to July 1, 2008, constitutes a separate violation of Wis. Admin. Code § NR 407.05(10).

70. Each day that you failed to correct your permit applications' false statements regarding compliance, including each day since July 1, 2008, constitutes a separate violation of Wis. Admin. Code § NR 407.05(9).

71. Each day that you falsely certified compliance with applicable operating permit requirements constitutes a separate violation of Wis. Admin. Code § NR 439.03.

CITIZEN SUIT ENFORCEMENT

The citizen suit provision of the Clean Air Act allows Cambrians to commence suit in a United States district court against you for violations of an emission standard or limitation. 42 U.S.C. § 7604(a). An emission standard or limitation is defined as to include any emission limitation, standard, or schedule, any permit term or condition, and any requirement to obtain a permit as a condition of operations. 42 U.S.C. § 7604(f). Cambrians intend to file suit against you, or amend any existing Complaint filed against you, at the expiration of a 60 day notice period.

If you believe any of the facts described above are in error or have any information indicating that you have not violated the Clean Air Act we urge you to contact the undersigned counsel immediately.

If you wish to enter negotiations, please contact the undersigned attorneys as soon as possible. If we do not hear from you within twenty days of this notice, or if you take any actions that indicate an unwillingness to negotiate in good faith, we will assume that you have declined this settlement offer and will take immediate steps to file an action.

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Sincerely,

Garvey McNeil & McGillivray, S.C.

A handwritten signature in blue ink, appearing to read "D.C.B.", which likely stands for David C. Bender.

Christa O. Westerberg

David C. Bender

Attorneys for Cambrians

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BY CERTIFIED MAIL

Lisa P. Jackson
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Hon. Eric H. Holder
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